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12 *Attorneys for Defendant POLYMER80, INC.*

13 **UNITED STATES DISTRICT COURT**

14 **DISTRICT OF NEVADA**

15 GLOCK, INC. a Georgia corporation,

16 CASE NO.: 3:23-cv-00086

17 Plaintiff,

18 vs.

19 POLYMER80, INC., a Nevada  
20 corporation,

**LPR 1-16 DEFENDANT'S RESPONSE  
TO PLAINTIFF'S OPENING BRIEF  
ON CLAIM CONSTRUCTION**

21 Defendant.

22 Defendant POLYMER80, INC. (hereinafter "Defendant") by and through its attorneys  
23 of record, ADAM R. FULTON, ESQ. and TOD R. DUBOW, ESQ., of the law firm of  
24 JENNINGS & FULTON, LTD., submits the following **RESPONSE TO PLAINTIFF'S**  
25 **OPENING BRIEF ON CLAIM CONSTRUCTION** pursuant to LPR 1-16:

26 **MEMORANDUM OF POINTS AND AUTHORITIES**

27 **A. LEGAL STANDARD FOR CLAIM CONSTRUCTION**

28 Claim construction allows for a determination of the ordinary meaning of a claim term  
29 to the standard used in patent analysis: a person of ordinary skill in the art at the time of the  
30 filing date of the patent application. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1313 (Fed. Cir.  
31 2005). In this determination, "only those terms need be construed that are in controversy, and

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1 only to the extent necessary to resolve the controversy.” *Vivid Techs, Inc. v. Am. Sci. & Eng’g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999). If the applicant acted as his own lexicographer and set forth clear definitions for disputed terms in claims, either in the specifications or through the prosecution history, the claim will not be interpreted to have its ordinary meaning. This is also true if intrinsic evidence supports the applicant distinguishing the term from its use in prior art “on the basis of a particular embodiment, expressly disclaimed subject matter, or described in a particular embodiment as important to the invention”. A third circumstance, there would be no ordinary meaning applied to a term “deprives the claim of clarity” and necessitates to other intrinsic evidence for a concrete meaning. Finally, a claim term will cover only the corresponding structure or step disclosed in the specification, and its equivalents, for performing a claimed function if the applicant phrased the claim in a means-plus-function format. *Edward Lifesciences LLC v. Cook Inc.*, 582 F.3d 1322, 1329 (Fed. Cir. 2009) citing *CCS Fitness, Inc. v. Brunswick Corp.*, 288 F.3d 1359, 1367 (Fed. Cir. 2002). The court should consider the patent’s prosecution history, which consists of “the complete record of the proceedings before the PTO and includes the prior art cited during the examination of the patent.” *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc).

## 19 B. PLAINTIFF’S DISCLOSED TERMS FOR CONSTRUCTION

20 1. “lower claw” (Claims 1-3): This term was disclosed by both parties.

21 **Proposed Construction by Defendant:** “A curved extension from the lower end region of  
22 the holding lever directed toward the upper claw to securely hold the compression spring in a  
23 compressed state.”

25 **Defendant’s supporting evidence:** See Patent file attached hereto as Ex. 1, at Bates 273 (“In  
26 contrast, the pistol of the present application incorporates an improved catch device that  
27 includes a spring that is retained by the catch device itself. The compression spring is retained

1 between an upper claw and a lower claw formed at the end of a holding lever, such that the  
 2 upper and lower claws are directed towards each other.” “The compression spring is both  
 3 easier to mount and more difficult to lose, as the spring can be installed between the claws  
 4 prior to the installation of the catch device in the body of the pistol.”) *See also* 222 Patent at  
 5 3:18-20. *See* Ex. 2. *See also* Merriam-Webster: “a sharp usually slender and curved nail on  
 6 the toe of an animal: any of various sharp curved processes especially at the end of a limb (as  
 7 of an insect) also: a limb ending in such a process: one of the pincerlike organs terminating  
 8 some limbs of various arthropods (such as a lobster or scorpion): something that resembles a  
 9 claw.” *See* Ex. 3. *See also* Cambridge Dictionary: “an object or tool for picking things up that  
 10 looks something like the claws of an animal, bird, or insect.” *See* Ex. 4.

12 **Defendant’s Response to Plaintiff’s construction:**

13 Plaintiff’s proposed construction is “*lower end region of the spring end of the holding*  
 14 *lever.*” This construction fails to adequately describe the function of the claw and the nature  
 15 of its physical form. The function is to retain the compression spring securely in connection  
 16 with the opposing upper claw. Ex. 1, at Bates 273. The nature of its form is of a curved  
 17 extension, the definition of a claw. *See* definitions above. Plaintiff is incorrect that defendant  
 18 is unduly imposing limitations on construction. Defendant’s proposed construction includes  
 19 clarifications taken directly from the patent file history, the issued patent, and well-established  
 20 dictionary definitions.

21 Plaintiff’s construction seeks a description with a vague functional meaning to cast the  
 22 largest net on things deemed an “equivalent.” The patent history shows that the application  
 23 was initially rejected due to prior art. During their response, the applicant explicitly stated  
 24 the importance of the two claws pre-tensioning the spring as the point of novelty “*because*  
 25 *an end of the holding lever of Muller does not include an upper and lower claw, directed*

1        *towards one another. The compression spring 146 of Muller therefore cannot be*  
 2        *pretensioned between such an upper and lower claw, as recited by claims 1 and 2.”* Ex. 1,  
 3        Bates 186.

4        Prosecution History Estoppel prevents a patent holder from claiming subject matter  
 5        elements that they surrendered during the patents prosecution in order to be granted that  
 6        patent. *Festo v. Shoketsu Kogyo Kabushiki Co. Ltd.*, 535 U.S. 722, 152 L. Ed. 2d 944. 122  
 7        S. Ct. 1831 (2002). Thus plaintiff seeks to avoid estoppel by proposing a construction that  
 8        could deem a thing as a lower claw regardless of the intended function.

9  
 10      **2. "retained by."** Defendant agrees that this is a significant term which should be  
 11      construed by the Court.

12      **Defendant's Proposed Construction:** “Securely held such that the spring is difficult to lose.”

13      **Defendant's Supporting Evidence:** *See* Prosecution history, Ex. 1, Bates 186 (“Because the  
 14      compression spring of the claimed holding lever is pretensioned between the *upper* and lower  
 15      claws of the holding lever, the spring may be placed on the holding lever where it is retained  
 16      securely”); Bates 273 (“The compression spring is both easier to mount and more difficult to  
 17      lose, as the spring can be installed between the claws prior to the installation of the catch  
 18      device in the body of the pistol.”); Bates 273 (“Furthermore, when the pretensioned  
 19      compression spring is tensioned further (as during use), there is virtually no relative  
 20      movement between the ends of the spring and adjacent components.”); and Merriam-webster  
 21      (“to hold secure or intact”). Ex. 5

22      **Defendant's Response to Plaintiff's construction:**

23      Plaintiff's proposed construction is “*held or kept by.*” This construction fails to provide  
 24      meaning by omitting the word “securely” and the phrase “difficult to lose” as provided in the  
 25      prosecution history above.

1                   **C. DEFENDANT'S DISCLOSED TERMS FOR CONSTRUCTION:**

2                   In an effort to narrow the issues to the most significant, Defendant submits only the  
 3 following additional term for the Court's construction:

4                   **3. "Pistol." (Claims 1-4).** This term is significant because Glock alleges that the  
 5 Accused Products are sold in kits with unassembled parts.

6                   **Defendant's Proposed Construction:** "An assembled pistol containing all parts necessary  
 7 for it to function."

8                   **Defendant's Supporting Evidence:** Glock US Patent **4,825,744**. *See* Ex. 6. US9933222  
 9 contains 4 claims each of which starts with the essential element of a "pistol." Plaintiff's  
 10 US Patent 4825744, which was incorporated by reference teaches in its abstract that an  
 11 automatic pistol included numerous parts to function as intended:

12                   "A pistol has a frame, a barrel slidable on the frame and having a cartridge-receiving  
 13 rear end, and a breech slidable on the frame and engageable over the rear end of the  
 14 barrel to form a cartridge chamber. A standard slide carries the barrel and breech. A  
 15 firing element and a firing pin operatively linked thereto are movable on the breech  
 16 toward and away from the barrel between a rear position in which the firing pin is out  
 17 of the cartridge chamber and a front position with the firing pin projecting forward  
 18 into the cartridge chamber for firing a cartridge in the chamber when the firing element  
 19 moves from the rear to the front position. A relatively strong firing spring braced  
 20 against the firing element urges same into the front position and a relatively weak  
 21 spring braced against the firing element urges same into the rear position. A trigger  
 22 movable on the frame between an actuated and an unactuated position and an  
 23 abutment engageable with the firing element and displaceable backward on the frame  
 24 are linked together so as to displace the firing element back into the rear position on  
 25  
 26  
 27  
 28

1 displacement of the trigger from the unactuated to the actuated position and to displace  
 2 the abutment out of operative engagement with the firing element on displacement of  
 3 the trigger into the actuated position for displacement of the firing element by the  
 4 springs into the front position.”

5 **Response to Plaintiff’s Argument:** The term “pistol” requires clarification because of the  
 6 unassembled nature of the Accused Products. It is clear that from Glock’s US Patent  
 7 **4,825,744** that a pistol must contain all parts necessary for it to function. This is not an undue  
 8 limitation, but a clarification based upon Glock’s own language contained in Glock’s US  
 9 Patent **4,825,744**.

11 **CONCLUSION**

12 Based upon the foregoing Defendant respectfully requests that the Court adopt  
 13 Defendant’s construction of the three (3) claim terms at issue.

14 DATED: December 14<sup>th</sup>, 2023

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**CERTIFICATE OF SERVICE**

Pursuant to F.R.C.P. 5(b), I hereby certify that I am an employee of JENNINGS & FULTON, LTD., and that on the 14<sup>th</sup> day of December 2023, I caused a true and correct copy of the foregoing **LP 1-16 DEFENDANT'S RESPONSE TO PLAINTIFF'S OPENING BRIEF ON CLAIM CONSTRUCTION** to be served via the U.S. District Court, District of Nevada's CM/ECF electronic filing and service system to:

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